

E-FILED ON 10/14/05

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DARNELL FARMEARL,

No. C04-02644 RMW (HRL)

Plaintiff,

**ORDER (1) GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO COMPEL AND (2)
DENYING PLAINTIFF'S MOTION FOR
SANCTIONS**

v.

STOROPACK, INC.,

[Re: Docket No. 57]

Defendant.

On October 11, 2005, this court heard the "Motion to Compel Discovery or for Sanctions" filed by plaintiff Darnell Farmearl. Defendant Storopack, Inc. opposed the motion. Upon consideration of the papers filed by the parties, as well as the arguments of counsel, the court issues the following order.

1. In his reply brief, plaintiff acknowledges that Document Request No. 5 is now irrelevant in light of the District Court's September 12, 2005 summary judgment order. Additionally, plaintiff states that he is not seeking a further response to Document Request No. 15. Accordingly, plaintiff's motion as to these requests is DENIED AS MOOT.

2. Preliminarily, defendant argues that the instant motion to compel discovery should be denied because it was filed well after the deadline for filing such motions. It asserts that the fact discovery cutoff was July 1, 2005, and any motions to compel were therefore required to be filed by July 12, 2005. *See* Civ. L.R. 26-2 ("Where the Court has set separate deadlines for fact and expert

1 discovery, no motions to compel fact discovery may be filed more than 7 court days after the fact
2 discovery cut-off . . .”). Nevertheless, the District Court permitted plaintiff to seek the discovery at
3 issue beyond the cutoff date despite the fact that the requests were belatedly served. This court
4 concludes that fairness dictates that he be given an opportunity to seek to enforce those requests.

5 3. Defendant also argues that the instant motion should be denied (or not entertained at
6 all) because plaintiff failed to conduct meet/confer negotiations in person or by telephone. Indeed, the
7 court’s Civil Local Rules require that, before a motion to compel is filed, the parties engage in direct
8 dialogue, either in person or over the telephone, to resolve any discovery dispute. Here, plaintiff’s
9 counsel acknowledges that he did not do so before filing the instant motion. Given the nature of the
10 issues presented, however, it seems that any further meet/confer efforts now would be unavailing.
11 Nevertheless, plaintiff’s counsel is reminded that he is obliged to engage in meaningful meet/confer
12 negotiations – either in person or by telephone – to resolve all disputed issues before seeking judicial
13 intervention. *See* Civ. L.R. 37-1(a); *see also* Civ. L.R. 1-5(n).

14 **Plaintiff’s Motion to Compel Documents**

15 4. Plaintiff has propounded requests seeking documents pertaining to (a) his employment
16 (Request No. 2); (b) employee Ernie Fulgado’s compensation (Request No. 3); (c) Ernie Fulgado’s
17 qualifications (Request No. 4); (d) “computerized files” of documents supplied by defendant at the
18 deposition of its Human Resources Director, Evelyn Burke (Request No. 10); and (e) “computer files”
19 of documents pertaining to plaintiff (Request No. 11). Plaintiff moves for an order compelling
20 defendant to produce responsive “computerized files.”

21 It was not clear what plaintiff meant by “computerized documents,” nor has he clearly
22 articulated what categories of “computerized documents” he seeks. At the hearing, plaintiff’s counsel
23 clarified that he seeks electronic copies of documents (i.e., to be produced on disks) pertaining to
24 plaintiff’s harassment complaints and to disciplinary actions against plaintiff. Plaintiff contends that date
25 discrepancies and formatting irregularities in the hard copy records produced by defendant indicate
26 that defendant either doctored the documents or created them after-the-fact to defend against his
27 claims in this lawsuit. Defendant states that it has produced printouts of all responsive documents,
28 including drafts (if any exist). Nevertheless, this court finds that plaintiff should have an opportunity to

1 verify the integrity of the hard copy documents, and defendant has not demonstrated any undue burden
2 that would be imposed.

3 Accordingly, **no later than October 25, 2005**, defendant shall produce a disk containing
4 electronic copies of documents comprising, referring, relating or pertaining to (a) plaintiff's disciplinary
5 records; (b) plaintiff's termination; and (c) defendant's investigation or inquiry (if any) into plaintiff's
6 complaints made with defendant or with the California Department of Fair Employment and Housing
7 ("DFEH"). Defendant's production shall include responsive documents, if any, from the particular
8 subdirectory from Burke's files referenced by plaintiff at the motion hearing. The electronic files,
9 including any meta data (i.e., information indicating when the file was created or modified and by
10 whom), shall be produced as they are kept in the ordinary course of business in accordance with
11 Fed.R.Civ.P. 34.

12 This order is without prejudice to plaintiff to request an expert inspection (at plaintiff's
13 expense) of defendant's pertinent computer hard drives upon a showing that the disk information does
14 not provide him with the information necessary to verify the integrity of defendant's documents.

15 5. Plaintiff seeks personnel records of (a) Roberto Martinez, a co-worker who allegedly
16 harassed plaintiff (Request No. 6); (b) Jesse Valderrama, plaintiff's former supervisor at Storopack
17 (Request No. 7) and Troy Biscardi, a Storopack manager (Request No. 8).

18 With respect to Request No. 6, defendant represents that it has produced all non-privileged
19 documents that refer or relate to Martinez's conduct which was of a racially or sexually offensive
20 nature. Nevertheless, plaintiff's motion as to this request is GRANTED as to any responsive
21 documents which refer or relate to (a) the incident in which Martinez allegedly left mice on sticky
22 paper on plaintiff's desk and (b) plaintiff's complaints about Martinez's allegedly being drunk on the
23 job. Such documents (if any) are relevant or reasonably calculated to lead to the discovery of
24 admissible evidence pertaining to plaintiff's retaliatory discharge or wrongful discharge claims. In
25 addition, to the extent defendant has responsive DFEH records in its possession, custody or control
26 which it has not produced to plaintiff, it shall do so. All such documents shall be produced **no later**
27 **than October 25, 2005**.
28

1 Plaintiff's motion as to Request Nos. 7 and 8 is DENIED. Plaintiff generally asserts that
2 Valderrama and Biscardi's conduct and performance records will show "how Storopack treated non-
3 Black employees different from Black employees . . ." (Mot. at 4:23-24). However, he has not
4 sufficiently explained how such records are relevant or reasonably calculated to lead to the discovery
5 of admissible evidence of his claims, nor has he shown a need for the information which outweighs
6 these individuals' privacy interests. Moreover, to the extent plaintiff seeks documents showing
7 whether these individuals exercised discretionary authority over decisions that ultimately determine
8 corporate policy, defendant represents that it has none.

9 6. Plaintiff moves to compel several categories of documents pertaining to non-party
10 employees including: (a) all documents reflecting "writings by employees about another employee's
11 performance or conduct" (Request No. 9), (b) all documents reflecting "performance evaluations of
12 management personnel" at defendant's San Jose office (Request No. 12); (c) all "time card documents
13 for machine operators from July 1, 2001 through December 31, 2001" (Request No. 19); and (d) all
14 "documents that refer or relate to any discipline taken against any Storopack San Jose employee"
15 (Request No. 23).

16 Request Nos. 9 and 23 are overbroad, and plaintiff has not sufficiently demonstrated the
17 relevance of other employees' writings and all other employees' disciplinary records as "comparative
18 evidence." Nor has he articulated a need for such information that outweighs these individuals' privacy
19 interests. His motion as to these requests is therefore DENIED.

20 Plaintiff has likewise failed to demonstrate the relevance of all management employees'
21 disciplinary records or to explain how other machine operators' time card documents are relevant to
22 "another form of harassment" against him. Accordingly, the motion is also DENIED as to Request
23 Nos. 12 and 19.

24 7. Request No. 13 seeks "[a]ll documents that refer or relate to investigations conducted
25 in the San Jose office of discrimination and harassment complaints from employees." The request is
26 overbroad, and the court is unconvinced that the documents are relevant or necessary as "comparative
27 evidence." In any event, defendant represents that it has produced all non-privileged responsive
28 documents. With respect to any investigations of plaintiff's complaints, at the hearing, defense counsel

1 represented that there was no investigation of his complaints other than telephone calls between Burke
2 and (unnamed) managers at the San Jose plant. He further represented to the court that these phone
3 calls were not documented in any form or fashion, except perhaps in notes made by Storopack's
4 attorneys. The court assumes that any claimed privilege documents have been included on defendant's
5 privilege log. Based upon defendant's representations, there appears to be nothing to compel.
6 Accordingly, plaintiff's motion as to this request is DENIED.

7 8. Request No. 16 seeks "[a]ll documents that refer or relate to training given to the
8 management personnel in San Jose." The request is overbroad and vague as to "training."
9 Nevertheless, defendant acknowledges in its opposition brief that anti-harassment training is relevant
10 or reasonably calculated to lead to the discovery of admissible evidence pertaining to plaintiff's claims
11 in this lawsuit. Accordingly, the motion is GRANTED as to any documents that refer or relate to anti-
12 harassment training given to defendant's San Jose management personnel during the period of
13 plaintiff's employment with defendant. Defendant shall produce all such documents **no later than**
14 **October 25, 2005**. Plaintiff's motion as to Request No. 16 is otherwise DENIED.

15 9. Request No. 18 seeks documents "that explain how Storopack determined hourly
16 rates to be paid to its machine operators." Plaintiff argues that defendant agreed to produce
17 responsive documents but has not yet done so. However, defendant has served a supplemental
18 response to this request stating that it "has no non-privileged documents that explain how Storopack
19 determined hourly rates to be paid to its machine operators at the San Jose plant." Thus, there appear
20 to be no documents to compel. Accordingly, plaintiff's motion as to this request is DENIED.

21 **Plaintiff's Motion to Compel Answers to Interrogatories**

22 10. Interrogatory No. 1 asks defendant to "[s]tate with particularity Defendant's
23 responses to each factual matter asserted in Plaintiff's complaint." Defendant objects to the
24 interrogatory on the ground that it seeks information pertaining to more than twenty-five discrete topics
25 and therefore violates the numeric limit on interrogatories under Fed.R.Civ.P. 33(a). The court agrees.
26 Accordingly, plaintiff's motion as to Interrogatory No. 1 is DENIED.

27 11. Interrogatory No. 2 asks defendant to "[i]dentify with particularity every occasion in
28 which Defendant alleges Darnell Farmearl engaged in misconduct during his employment at Storopack,

1 Inc.” In response, defendant asserted several objections, but nevertheless referred in its answer to
2 several documents, including (a) the declarations of Evelyn Burke and Troy Biscardi submitted in
3 support of defendant’s summary judgment motion and (b) the 290-page transcript of Evelyn Burke’s
4 deposition. There is some question in this court’s mind as to whether these documents are “business
5 records” which may be identified in lieu of an answer under Fed.R.Civ.P. 33(d). Nevertheless,
6 plaintiff’s only complaint is that defendant should be compelled to specify where in the declarations
7 and deposition transcript the responsive information is located.

8 Defendant has specified the records from which it claims the answer may be ascertained.
9 Fed.R.Civ.P. 33(d) (“A specification shall be in sufficient detail to permit the interrogating party to
10 locate and identify, as readily as can the party served, the records from which the answer may be
11 ascertained”). The court is not convinced that the burden of locating the responsive information within
12 the specified records is any greater for plaintiff than for defendant. Accordingly, plaintiff’s motion as to
13 this interrogatory is DENIED.

14 12. Interrogatory No. 3 asks defendant to “[i]dentify with particularity each instance in
15 which a warehouse employee worked overtime hours (i.e., more than 8 hours in a day or 40 hours in a
16 week) during the final three months of 2001.” Plaintiff contends that the information is relevant
17 because defendant allegedly allowed non-African-American employees to work overtime, but barred
18 him from doing so. However, defendant has submitted excerpts of plaintiff’s own deposition testimony
19 in which he appears to acknowledge that (a) the denial of his overtime is not based on race
20 discrimination and (b) Leray Williams, an African-American co-worker, was allowed to work
21 overtime when plaintiff allegedly was not permitted to do so. (Sommer Decl., Ex. G (Farmearl Depo.,
22 79:10-81:2)). The motion as to Interrogatory No. 3 is DENIED.

23 13. Interrogatory No. 4 asks defendant to “[i]dentify with particularity every form of
24 communication between Darnell Farmearl and Roberto Martinez which Defendant contends was
25 welcomed by Mr. Farmearl.” In meet/confer negotiations, plaintiff apparently clarified that he sought
26 instances of “mutual horseplay” between plaintiff and Martinez. Despite plaintiff’s claim to the
27 contrary, the papers submitted to the court show that defendant did serve its supplemental response to
28 this interrogatory.

1 At the hearing, defense counsel represented, unequivocally, that defendant has identified all
2 the instances of “horseplay” of which it is currently aware. Accordingly, the motion as to this
3 interrogatory is DENIED. Nevertheless, the court notes that defendant also claims that it “is unable to
4 identify every possible communication between plaintiff and Martinez that demonstrates that they
5 engaged in ‘horseplay,’” and apparently leaves it to defendant’s employee-witnesses to testify at trial
6 about any incidents which defendant claims that it cannot now recall. Defendant is obliged to conduct
7 a reasonable investigation and to respond fully providing “such information as is available” to it. *See*
8 Fed.R.Civ.P. 33(a). Further, defendant is obliged “seasonably to amend” its discovery responses as
9 may be necessary. *See* Fed.R.Civ.P. 26(e). To the extent defendant attempts to introduce testimony
10 about any such incidents for the first time at trial, it shall be required to show good cause why it was
11 unable to disclose the information sooner.

12 14. Interrogatory No. 5 asks defendant to “[i]dentify with particularity every internal
13 investigation conducted of the complaints raised by Darnell Farmearl about his working conditions at
14 Storopack, Inc.” Defendant asserted a number of objections and states that it “is unable to respond
15 because Plaintiff complained so frequently throughout his employment concerning matters completely
16 unrelated to his harassment claim.” Nevertheless, it responded that once plaintiff filed his DFEH
17 complaint, defendant “conducted an investigation of his allegations which included interviewing plant
18 management.” Defendant represents that it has provided a complete response as to plaintiff’s
19 harassment complaints based on currently available information. Accordingly, the motion as to this
20 request is DENIED. As noted above, however, defendant is reminded of its obligation to conduct a
21 reasonable investigation as to the matter and to seasonably amend its response as may be necessary.
22 Fed.R.Civ. P. 33(a), 26(e).

23 15. Interrogatory No. 6 asks defendant to “[s]tate with particularity all facts that support
24 any denials Defendant has of the factual allegations made in the declarations used as exhibits in the
25 Evelyn Burke deposition.” Defendant contends that this interrogatory seeks information pertaining to
26 more than 25 discrete topics and therefore violates the 25-interrogatory limit set by Fed.R.Civ.P.
27 33(a). Plaintiff contends that the interrogatory should be construed as only two separate requests.
28

1 Neither party has presented any basis for this court to meaningfully evaluate its assertions.

2 Accordingly, the motion is DENIED.

3 16. Interrogatory No. 7 asks defendant to “[s]tate with particularity all facts that support
4 Defendant’s contention that Darnell Farmearl was never subjected to any incidents of harassment
5 during the course of his employment.” Defendant asserted several objections, but nevertheless
6 responded with reasons why it believes that plaintiff was not subject to unwelcome harassment which
7 created a hostile work environment. Plaintiff fails to demonstrate how defendant’s response is
8 “evasive and non-responsive.” The motion as to this interrogatory is DENIED.

9 **Plaintiff’s Motion to Compel Admissions**

10 17. Request for Admission Nos. 1 and 2 seek admissions that “Darnell Farmearl’s writing
11 in January 2003 that an employee was drunk while at work was at least one reason why Storopack
12 discharged Mr. Farmearl” and “Darnell Farmearl’s writing in January 2003 that an employee drunk at
13 work had not been sent for a ‘piss test’ was at least one reason why Storopack discharged Mr.
14 Farmearl.”

15 Defendant objected to the requests as vague and ambiguous as to the phrase “Darnell
16 Farmearl’s writing.” It also objected on the ground that, as worded, the requests create unfair
17 inferences and are subject to a variety of interpretations. Nevertheless, it responded with a qualified
18 admission that plaintiff was fired “for his continuously disrespectful and insubordinate conduct, which
19 was evidenced, in part, by him writing inflammatory comments about a co-worker on a wall calendar
20 that was visible in the workplace.”

21 Plaintiff contends that defendant has re-written the interrogatories and that its responses
22 conflict with its stated position in the litigation that plaintiff was not fired for the content of his writings.
23 However, the court finds that defendant fairly qualified its admissions to reflect defendant’s apparent
24 position that plaintiff was fired for the manner in which his “writing” was made. To the extent plaintiff
25 takes issue with the veracity of these responses, it is not this court’s role on the present motion to
26 determine the truth of the matter asserted. Accordingly, the motion as to these requests are DENIED.

27 18. Request for Admission No. 3 seeks an admission that “[i]mmediately after seeing
28 Darnell Farmearl’s writing on or about January 10, 2003 about Roberto Martinez, Storopack

1 concluded that Mr. Martinez had been under the influence of alcohol at work.” Defendant objected to
2 the request as vague and ambiguous with respect to the phrase “Darnell Farmearl’s writing” and
3 further objected that, as worded, the request created unfair inferences. Nonetheless, defendant
4 admitted that “it concluded that Mr. Martinez was under the influence of alcohol for reasons
5 independent of Mr. Farmearl’s writing.”

6 Plaintiff fails to articulate how defendant’s response is deficient and asserts only that this
7 request “require[s] [a] respons[e] also.” (Reply at 4:27). Accordingly, the motion as to this request
8 is DENIED.

9 19. Request for Admission No. 5 seeks an admission that “[a]fter receiving Darnell
10 Farmearl’s administrative Charge of Discrimination, Storopack failed to conduct an investigation into
11 any of the claims in that Charge of Discrimination.” Defendant objected to the phrase “administrative
12 Charge of Discrimination” as vague and ambiguous, but nevertheless denied the matter based upon its
13 understanding of the request. Plaintiff offers no explanation as to why defendant’s response is
14 deficient, except to say that this request “require[s] [a] respons[e] also.” (Reply at 4:27). The motion
15 as to this request is DENIED.

16 20. Request for Admission No. 6 seeks an admission that “[a]t no time during the two
17 year period prior to January 10, 2003, did Storopack ever investigate Darnell Farmearl’s complaints
18 about sex or race discrimination.” Defendant objected to the phrase “complaints about sex or race
19 discrimination” as vague and ambiguous. It nevertheless denied the matter based upon its
20 understanding of the request. Plaintiff offers no explanation as to why defendant’s response is
21 deficient, asserting only that this request “require[s] [a] respons[e] also.” (Reply at 4:27). The motion
22 as to this request is DENIED.

23 **Plaintiff’s Motion for Sanctions**

24 21. Plaintiff’s motion for sanctions is DENIED. Defendant correctly notes that the motion
25 did not comply with Civil Local Rule 37-3. In any event, under the circumstances presented, the court
26 concludes that sanctions are not warranted.

27 Dated: October 14, 2005

/s/ Howard R. Lloyd
HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

1 5:04-cv-2644 Notice will be electronically mailed to:

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